Supreme Court, U.S.
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No. 00-0037

IN THE

Supreme Court of the United States

LAURA HOLLISTER,

Cross-Petitioner,

v.

TARGET CORPORATION,

Cross-Respondent.

ON CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court of appeals violates the principles set forth in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), by failing to correctly apply state law to its analysis of state law claims in a diversity case.

LIST OF PARTIES

American Community Mutual Insurance Company, initially served as a respondent, is being served as a cross-respondent herein.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Cited Authorities	iv
Opinions Below	1
Statement of Jurisdiction	1
Statutes or Other Provisions Involved	2
Statement of the Case	2
Reasons for Allowing the Writ	7
I. The Court of Appeals' Analysis of Hollister's Design Defect Claim is Inconsistent With Sixth Circuit Precedent.	8
II. The Court of Appeals' Decision Represents a Significant Departure From Michigan's Risk-Utility Test.	13
Conclusion	15

Page

TABLE OF CITED AUTHORITIES

Erie Railroad Co. v. Tompkins, 304 U.S. 64 (1938) ..... i, 7

Hollister v. Dayton Hudson Corporation, 201 F.3d 731 (2000) 1

Phillips v. Hardware Wholesalers, Inc., 762 F.2d 46 (6th Cir. 1985) 10, 11, 13, 14

Prentis v. Yale Mfg. Co., 365 N.W.2d 176 (1985) ... 13

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1332 6

Rule:

United States Supreme Court Rule 12.5 1

Laura Hollister ("Hollister") respectfully cross-petitions this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in *Hollister v. Dayton Hudson Corporation*, 201 F.3d 731 (2000).

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Michigan granting summary judgment in Dayton Hudson's favor is reported at 5 F. Supp. 2d 530 and is reproduced in the appendix of Dayton Hudson's Petition for a Writ of Certiorari (hereinafter "Pet. App.") at pages 23a to 46a. The original opinion of the United States Court of Appeals for the Sixth Circuit is reported at 188 F.3d 414 and is reproduced at Pet. App., pp. 22a-1 to 22a-16. The amended opinion of the court of appeals which is the subject of this petition is reported at 201 F.3d 731 and is reproduced at Pet. App., pp. 1a to 22a. The opinion of the court of appeals denying the parties' petitions for rehearing *en banc* is unreported and is reproduced at Pet. App., pp. 47a to 48a.

STATEMENT OF JURISDICTION

The Petition for a Writ of Certiorari of Dayton Hudson Corporation, now known as Target Corporation ("Petitioner" or "Dayton Hudson"), was docketed on June 1, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 12.5 of the Rules of the Supreme Court and is conditional upon this Court's grant of the Petition for Writ of Certiorari.

STATUTES OR OTHER PROVISIONS INVOLVED

None.

STATEMENT OF THE CASE

On November 5, 1995, Laura Hollister, then a 25-year-old student at Northwestern University's business school in Evanston, Illinois, was severely burned when her rayon shirt contacted the burner of the electric stove in her apartment. Because the fire burned so rapidly and intensely, only a few small remnants of the shirt survived the fire, and the manufacturer of the shirt could not be identified from those remnants. Hollister sued the seller of the shirt, Dayton Hudson, asserting design defect and failure to warn claims under both negligence and implied warranty legal theories.

Hollister suffered severe burns in the fire and was profoundly disfigured as a result of those burns. Virtually all of her upper body was burned, from her hips to the top of her head. She has required comprehensive skin grafting to the entire upper portion of her body, as well as extensive plastic and reconstructive surgery. Her burns caused her to lose both of her breasts, her nose, her ears, her chin, and most of her left thumb. She has endured countless hours of surgery and enormous pain and suffering. She likely will continue to require treatment and further surgeries for the rest of her life.

The fire in Hollister's apartment was investigated by the Evanston Fire Department and the United States Bureau of Alcohol, Tobacco, and Firearms ("ATF"). The Evanston Fire Department Incident Report, which was completed after the fire department personnel had been to Hollister's apartment

on the day of the fire, indicates that the fire started in Hollister's kitchen when Hollister's clothing was ignited while she was cooking. These findings were confirmed in the report of the ATF, which investigated the fire at the request of the Evanston Fire Department. The ATF investigator made the following findings regarding the origin of the fire and Hollister's actions after her shirt caught on fire:

> The origin of the fire was in the kitchen. The victim's clothing was apparently ignited by the burner on the electric stove while she was cooking. Firefighters arriving to assist the ambulance crew reported that the right front and right rear burners were red hot. Ms. Hollister was wearing a plaid shirt that buttoned up the front and a second pullover top under that. She was apparently not wearing any skirt or slacks so the shirttail may have moved onto the burner while she reached into a cabinet over the stove. The fire spread on her clothing and some burned cloth fell to the kitchen floor. She apparently attempted to put out the flames by leaning over the counter in an attempt to smother the flames. She next ran into the bathroom and attempted to put out the flames using water from the tub, more of the burning material fell to the floor in the bathroom and burned the center of a small throw rug and the tile floor beneath it. The victim then filled the tub and soaked in it because more burned clothing was found in the tub full of water. The tub apparently overflowed soaking the carpeting in the hall and damaging the bottom of the plasterboard walls. The victim subsequently went

> to her bedroom and rested on the bed as more burned clothing (some wet) and some evidence of body fluids were visible there. These observations were made from the combination of eye witnesses, fire fighters, and the evidence of normal fire progression during the origin and cause determination.

Based upon these findings, the ATF investigator came to the following conclusion:

> After careful examination of this fire scene along with any relevant reports it is my opinion that the cause of this fire should be classified as accidental caused by ignition of the victim's clothing by the stove burner while she was cooking.

Because of the intensity of the fire, few remnants of the shirt remained after the fire. These remnants were gathered by Evanston Police and Fire Department personnel on November 5-6, 1995. The shirt remnants consist of several pieces of the shirt, certain of which are so severely burned that only a faint trace of the plaid pattern is discernible. Three substantial pieces remain: a cuff, a piece of the front of the shirt with a button hole and button, and a single-ply piece.

Plaintiff's fabrics expert, Dr. David Hall, Professor Emeritus of Textile Engineering at Auburn University, examined certain of the fabric remnants, and performed flammability tests on substantially identical exemplar fabric. The exemplar fabric Dr. Hall tested came from shirts purchased at a Dayton Hudson store. These exemplar shirts initially were identified by Dayton Hudson's expert. Dr. Hall analyzed the fabric of the exemplar shirts, and determined

that the exemplar shirts and the shirt Hollister wore at the time of the fire were extremely close in weight and had the same weave, fiber type (100% Rayon), fiber denier, and air porosity.

Dr. Hall compared the physical properties, as well as the ignition and burning characteristics, of the exemplar fabric to certain other types of fabric. Dr. Hall first put an exemplar shirt on a hanger and passed it back and forth once over the burner of a GE electric range similar to Hollister's. The front of the shirt contacted, but never rested on, the hot burner. The shirt caught fire immediately and was completely engulfed in flames within approximately ten seconds, with flames shooting at least one foot higher than the shoulder of the shirt.

Dr. Hall next cut a 3.5 by 10.0 inch sample of the fabric from another exemplar shirt and tested its flammability against the same size samples of fourteen other materials. These other materials included three other types of rayon (of assorted weaves, two of comparable weight to that of the exemplar shirt and one of heavier weight), a rayon/wool blend, a rayon/polyester blend, and a rayon/acetate blend, as well as samples of wool, acrylic, acetate, silk, polyester, and cotton. Finally, Dr. Hall tested a sample of news print from a U.S.A. Today newspaper.

The test samples were individually put on a swing arm and then passed over the burner of the same electric range used for the test of the exemplar shirt. Like the exemplar shirt, the samples contacted, but never rested on, the hot burner. The fabric sample from the exemplar shirt ignited from the contact and burned completely in six seconds. Eleven of the other fourteen test samples did not ignite. This

group included the cotton sample and a 100% rayon fabric from a shirt that was manufactured in the United States.

The three test samples that did ignite were a 100% rayon produced overseas, a rayon-polyester blend, and the newspaper. The other 100% rayon and the rayon-polyester blend burned in approximately twelve seconds, or about twice as long as the sample from the exemplar shirt. The newspaper burned slightly faster than the exemplar shirt, in about four seconds. Dr. Hall's testing was recorded on videotape, and a copy of the tape is included in the record.

On March 27, 1996, Hollister's parents filed the present action on her behalf in Wayne County, Michigan, Circuit Court. It was removed to the United States District Court for the Eastern District of Michigan on July 11, 1996.[1] The suit charged that Dayton Hudson was negligent and breached an implied warranty by selling a highly flammable shirt and by failing to warn of the shirt's dangerous flammability. Several other defendants were originally named in the action, but were subsequently dismissed from the case. Pursuant to a motion filed on July 31, 1997, Hollister was substituted for her parents as the plaintiff in this action.

On May 12, 1998, the district court awarded Dayton Hudson summary judgment. (*See* Pet. App., pp. 23a to 46a.) The jurisdiction of the United States District Court for the Eastern District of Michigan was premised on 28 U.S.C. § 1332, in that the amount in controversy exceeds $75,000 and this is a civil action between citizens of different states.

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1. Service of process on the first defendant served took place on June 14, 1996, and that defendant's Notice of Removal was filed in the district court on July 11, 1996.

Specifically, plaintiff Laura Hollister is a citizen of Michigan, while defendant Dayton Hudson Corporation is incorporated and has its principal place of business in Minnesota.

On August 25, 1999, a panel of the Sixth Circuit Court of Appeals affirmed. (*See* Pet. App., pp. 22a-1 to 22a-16.) On September 7, 1999, Hollister filed a combined petition for panel rehearing and rehearing *en banc*. On January 13, 2000, the same panel filed an amended opinion, reversing summary judgment as to plaintiff's failure to warn claim, but affirming summary judgment as to her design defect claim. (*See* Pet. App., pp. 1a to 22a.) On March 2, 2000, the court of appeals denied the parties' petitions for rehearing *en banc*. (*See* Pet. App., pp. 47a to 48a.)

REASONS FOR ALLOWING THE WRIT

The Petitioner has requested that this Court review the Sixth Circuit Court of Appeals' application of Michigan law in this diversity case. In support of its request, the Petitioner argues that the court of appeals failed to conduct a principled analysis of Michigan law pursuant to *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and that the court therefore reached an erroneous result in its analysis of Hollister's failure to warn claim.

For the reasons that will be set forth in her brief in opposition to Dayton Hudson's petition, Hollister believes that Dayton Hudson's argument is entirely without merit, and that this Court should decline to accept this case for review. Indeed, if this Court accepted the Petitioner's argument, virtually every case in which a federal court applies state law would be appropriate for review by this

Court. Nevertheless, if this Court accepts the Petitioner's reasoning concerning the importance of review in this case, then this Court should review the court of appeals' application of Michigan law to all of the issues that were before it, and not merely the subset of issues raised in Dayton Hudson's petition. If this Court is inclined to examine the court of appeals' analysis, it will quickly become clear that the court's errors were confined to the portion of its amended opinion in which it affirmed summary judgment against Hollister on her design defect claim. Thus, if this Court allows a writ in this case based on the flawed arguments raised in the Petition for a Writ of Certiorari, it should allow the writ requested herein, as the only errors in the court's opinion relate to its design defect analysis.

I. The Court of Appeals' Analysis of Hollister's Design Defect Claim is Inconsistent With Sixth Circuit Precedent.

In its amended opinion, the court held that plaintiff could not establish a *prima facie* case of design defect unless she showed that a safer shirt could be produced which had all the wear and aesthetic qualities of the shirt she was wearing at the time of her injury:

> Hollister's claim of design defect is primarily based upon the tests conducted by Dr. Hall, in which the exemplar fabric and fourteen other fabric samples were dragged across a hot burner at a prescribed rate. Those tests indicate that the exemplar fabric was significantly more flammable than other fabrics. Hollister presented no evidence, however, as to the availability of alternative fabrics when the shirt was

> manufactured, the cost of manufacturing the shirt with such fabrics, or the effect of a fabric change upon the wearability, durability, or appearance of the fabric. (Pet. App., p. 13a)

Contrary to the court of appeals' opinion, Hollister presented ample evidence of the availability of alternative fabrics.

Plaintiff's fabric expert, Dr. Hall, performed videotaped testing of a substantially identical exemplar shirt against fourteen other types of fabrics, including other rayons, wool, silk, polyester, and cotton. To the extent that actual evidence was needed that these common materials were available for use in women's shirts and blouses in 1988-89 when the Dayton Hudson shirt was sold, plaintiff did present documentary evidence regarding all of those fabrics except silk. (*See* R. 262, Plaintiff's Supplemental Response, Exh. 2, Joint Appendix at pp. 797-802.) Silk, of course, has been used in clothing for approximately 4 millennia. Moreover, in his videotaped testing, Dr. Hall stated that each of the alternative fabrics in the test was commercially available. (R. 312, Fabric Flammability Testing Videotape, Joint Appendix at p. 937.) One of his expert reports also stated that "[t]here are other practical and economical alternative methods to make a safer product without substantially increasing the cost of the garment." (R. 224, Exh. 17, p. 1, Joint Appendix at p. 509.) Thus, the record shows beyond dispute that plaintiff presented evidence regarding both the availability of alternative fabrics and the comparable cost for such fabrics.

In other words, the court's last factor (wearability, durability, or appearance) is the only one on which plaintiff

arguably did not present evidence.[2] Consequently, the court ruled that plaintiff did not present a *prima facie* case of design defect, because plaintiff did not show that the alternative fabrics in Dr. Hall's tests had the same wearability, durability, and appearance as the Dayton Hudson shirt involved in the injury.

The court's ruling is directly contrary to its previous decision in *Phillips v. Hardware Wholesalers, Inc.*, 762 F.2d 46 (6th Cir. 1985), and it represents a marked change in the risk-utility test that governs design defect cases in Michigan. *Phillips* involved an accident that occurred when an extension ladder slipped on a tile floor. The plaintiff claimed that the feet or "pads" on the bottom of the ladder were defective in that their design and the material of which they were manufactured were inadequate to prevent the ladder from slipping on certain surfaces. The plaintiff's expert witness testified that several alternatives to the pads on the plaintiff's ladder were available and further testified concerning alternative designs that were not in use at the time, but which were feasible from an engineering standpoint. He discussed advantages and disadvantages associated with the alternatives he identified. Other than identifying the material from which the alternatives were constructed, the plaintiff's expert provided no information concerning the details of the alternative designs. Moreover, other than testifying generally that the alternatives he offered would reduce slippage under conditions similar to those present at the time of plaintiff's accident, plaintiff's expert provided no quantification of the

2. Although Dr. Hall tested other rayons, plaintiff did not attempt to compare the other rayons to the shirt at issue in the case in terms of wearability, durability, or appearance. Plaintiff did not, and does not, believe such proof is necessary to establish a *prima facie* case for the reasons stated in this petition.

reduction in slippage he would expect using the alternative designs he identified.

In affirming a jury verdict for plaintiff, the court held that a plaintiff may avoid a directed verdict by "offering proof that the alternatives were in use at the time the defective product was manufactured and by presenting expert testimony that the alternatives were reasonable." *Id.* at 48 (citations omitted). The court noted that plaintiff's expert "testified that the alternatives he proposed were available, reasonably efficient, and safe . . ." *Id.* at 49. The court held that "[t]his testimony was adequate to meet [plaintiff's] burden of adducing evidence of the reasonableness of alternatives." *Id.*

The evidence Ms. Hollister produced in this case not only meets, but substantially exceeds, the standard announced in *Phillips*. As previously indicated, plaintiff's fabric expert, Dr. Hall, stated in one of his reports that "[t]here are other practical and economical alternative methods to make a safer product without substantially increasing the cost of the garment." (R. 224, Ex. 17, p. 1, Joint Appendix at p. 509.) Dr. Hall testified at his deposition that "increasing the size of the rayon fibers and the weight of the fabric would increase safety." (R. 173, Ex. A, p. 247, Joint Appendix at p. 160.) His supplemental report further pointed out that fabric flammability is affected by fiber content, weave, and air porosity in addition to weight, and that fabrics having the same weights but different weave characteristics may burn differently. (R. 224, Ex. 22, p. 2, Joint Appendix at p. 524.)

Dr. Hall then conducted videotaped fabric flammability tests, testing a substantially identical exemplar shirt against

various different types of women's shirt fabrics. In his videotaped testing, Dr. Hall stated that each of the alternative fabrics tested was commercially available. (R. 312, Fabric Flammability Testing Videotape, Joint Appendix at p. 937.) In his supplemental report concerning that testing, Dr. Hall identified the stores where certain of the alternative fabrics were purchased and provided detailed information concerning the fiber content, weight, and weave characteristics of every one of the alternative fabrics he identified and tested. (R. 224, Ex. 22, p. 1 and Table I, Joint Appendix at pp. 523, 525.) In addition, Dr. Hall's report identified certain of the fabric samples he tested as having been cut from women's blouses he purchased. (*See id.* at Table I.)

These comparison fabrics included the precise type of alternative he identified during his deposition and in his report, *i.e.*, a rayon fabric having higher weight, greater fiber size, and different air porosity. Test fabric C was a 100% rayon fabric sample cut from a woman's blouse which was heavier and more tightly woven than the exemplar fabric. (*See* R. 224, Ex. 22, Table I, Joint Appendix at p. 525.) That test fabric failed to ignite. (*See* R. 312, Fabric Flammability Testing Videotape, Joint Appendix at p. 937.)

In addition, Dr. Hall's fabric flammability tests graphically demonstrate that alternative fabrics commonly used to manufacture women's blouses either would not have ignited or would have burned significantly more slowly than plaintiff's shirt. His report provided detailed information concerning the fiber content, weight, and weave characteristics of each of the tested alternative fabrics. (*See* R. 224, Ex. 22, Table I, Joint Appendix at p. 525.) Far from failing to identify a proposed alternative fabric,

Dr. Hall identified numerous alternative fabrics and provided detailed information concerning the content and construction of each of them. Indeed, the court observed that "Hollister presented credible evidence that the exemplar fabric burned explosively, like newspaper, and that other comparable fabrics did not." (Pet. App., p. 19a.) This evidence concerning reasonable alternatives exceeds the standard embodied in the *Phillips* decision.

II. The Court of Appeals' Decision Represents a Significant Departure From Michigan's Risk-Utility Test.

The court of appeals' decision represents a marked change in Michigan's risk-utility test. That test, as the name implies, is a balancing test, *i.e.*, risks are balanced against utility. *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 185-86 (1985). The court of appeals recognized that plaintiff had established the magnitude and severity of risk from highly flammable clothing. (Pet. App., pp. 14a-16a.) Nevertheless, the court held that a jury could not balance that risk against the utility of the Dayton Hudson shirt unless plaintiff could show that an available alternative had the exact same wearability, durability, or appearance.

This standard eliminates the balancing inherent in the risk-utility test. Under the court of appeals' decision, no matter how dangerous the product, the seller will escape liability unless the plaintiff can establish that a safer alternative has the same wearability, aesthetic qualities, and consumer appeal. For example, assume highly flammable children's pajamas cannot be made less flammable without changing their durability, feel, or appearance or without increasing their cost. Does that mean that a seller of such

pajamas would have no liability if some children were burned to death wearing those pajamas regardless of the seller's knowledge of the risk? The obvious answer to that question is "no." Yet, the court of appeals' decision here would require that question to be answered "yes."

The utility of the Dayton Hudson shirt involved in this case was to cover the upper part of a woman's body. Plaintiff showed numerous alternative fabrics, including other rayons, that would have safely fulfilled that function. Dayton Hudson can argue that the appearance, wearability, and other aesthetic qualities of the shirt justified its highly flammable nature. However, under *Phillips*, that balancing of risks against alleged benefits is a jury issue. For that reason, the design defect portion of the court of appeals' opinion conflicts with Michigan law.

CONCLUSION

For the reasons that will be set forth in her opposition to the Petition for a Writ of Certiorari, Laura Hollister believes that this Court should not accept this case for review. However, to the extent that the Court finds the reasoning set forth in the Petition concerning the importance of review persuasive, the Court should grant this Conditional Cross-Petition because the court of appeals' errors were confined to the portion of its opinion in which it affirmed summary judgment on Hollister's design defect claim.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR CROSS-RESPONDENT TARGET CORPORATION

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QUESTIONS PRESENTED

I Whether the constitutionally mandated rule of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), requires more than the identification and reasoned application of the correct rule of state law.

II. Whether the United States Court of Appeals for the Sixth Circuit properly identified Michigan's risk-utility test as the rule of decision and correctly applied it to the facts of this case.

STATEMENT PURSUANT TO RULE 29.6

The statement in the Petition for Writ of Certiorari filed by Dayton Hudson Corporation, now known as Target Corporation, is accurate.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

A. THE ACCIDENT 2

B. DISCOVERY AND PLAINTIFF'S FLAMMABILITY TESTS ... 3

REASONS FOR DENYING THE WRIT 4

I. THE TRIAL AND APPELLATE COURTS CORRECTLY ANAYLYZED PLAINTIFF'S DESIGN DEFECT CLAIM UNDER MICHIGAN LAW 5

A. THE TRIAL AND APPELLATE COURTS PROPERLY IDENTIFIED AND APPLIED MICHIGAN'S RISK-UTILITY TEST TO PLAINTIFF'S DESIGN DEFECT CLAIM 5

B. THE TRIAL AND APPELLATE COURTS' DECISION ON PLAINTIFF'S DESIGN DEFECT CLAIM IS CONSISTENT WITH THE DECISIONS IN *PHILLIPS* AND *PRENTIS* 8

II. PLAINTIFF'S CROSS-PETITION REVEALS HOW THE HOLLISTER COURT DEPRIVED HUDSON'S OF PROCEDURAL DUE PROCESS 10

CONCLUSION 12

TABLE OF AUTHORITIES

CASES

DAUBERT V. MERRELL DOW PHARMACEUTICALS, INC., 509 U.S. 579 (1993) 4, 11

ERIE RAILROAD CO. V. TOMPKINS, 304 U.S. 64 (1938) 13

GAWENDA V. WERNER CO., 932 F. SUPP. 183 (E.D. MICH. 1996) 7

GREGORY V. CINCINNATI, INC., 538 N.W.2D 325 (1995) 6

OWENS V. ALLIS CHALMERS CORP., 326 N.W.2D 377 (MICH. 1982) 7

PHILLIPS V. HARDWARE WHOLESALERS, INC., 762 F.2D 46 (6TH CIR. 1985) 8

PRENTIS V. YALE MANUFACTURING CO., 365 N.W.2D 176 (MICH. 1984) 5, 6

REEVES V. CINCINNATI, INC., 439 N.W.2D 326 (MICH. CT. APP. 1989) 7

REGULATIONS

16 C.F.R. § 1615-16 (2000) 9

STATEMENT OF THE CASE

Plaintiff has filed a conditional cross-petition in response to the petition of Target Corporation (previously known as Dayton Hudson Corporation and referred to in this response as "Hudson's"). If the Court grants Hudson's petition, Plaintiff wants to ensure judicial review of her design defect claim as well as the one for failure to warn.[1] It is unclear from her cross-petition, however, whether she seeks review of her design defect claim under an implied warranty theory, a negligence theory, or both. The lack of clarity will have no bearing on this response because Michigan treats both theories the same and requires the same proof under each. In all events the appellate court identified the right rule of law and correctly applied it. Thus, there is no reason to grant Plaintiff's cross-petition.

Plaintiff's cross-petition does serve one valuable purpose: it highlights the need for review of Hudson's petition. She undoubtedly would agree with Justice Black's assessment that *Erie* is "one of the most important cases at law in American legal history." Justice Hugo L. Black, Before the Missouri Bar (Sept. 25, 1942) *in* Address, 13 Mo.B.J. 173, 174 (1942). Plaintiff implicitly recognizes the importance of *Erie* when she writes, "if this Court accepted the Petitioner's argument, virtually every case in which a federal court applies state law would be appropriate for review by this Court." (Cross-pet. at 7-8.) Although its frequent application demonstrates *Erie*'s importance as a doctrine, this alone does not justify review.

This Court's review becomes essential when an appellate court refuses to follow *Erie*, ignores state law altogether, and conjures up a rule of law expressly rejected

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[1] As was true in its petition, Hudson's will refer to Plaintiff's allegations of wrongdoing for design defect and failure to warn as "claims." Hudson's will refer to Plaintiff's causes of action for negligence and breach of an implied warranty as "theories."

by the state's highest court. Not only does *Erie*'s importance justify review under these circumstances, the difficulties inherent in ascertaining unsettled or obscure areas of state law also justify review so that the Court can develop uniform guidelines for their resolution. The need for review is heightened when such a plain violation of *Erie* occurs without notice or an opportunity for the other side to be heard. It is these differences that explain why Hudson's petition should be granted and Plaintiff's denied.

A. THE ACCIDENT

On November 5, 1995, Plaintiff was injured in a mysterious fire of unknown origin. This conclusion will remain forever unchanged because she has no memory of the fire and there were no eyewitnesses. The report from the United States Bureau of Alcohol, Tobacco, and Firearms ("ATF") does nothing to dispel this uncertainty. The ATF investigator obviously understood the shortcomings in his report when he wrote, "[s]he was *apparently* not wearing any skirt or slacks so the shirttail [of her blouse] *may* have moved onto the burner while she reached into a cabinet over the stove." (J.A. at A0493 (emphasis added).) The lead investigator for the Evanston Fire Department confirmed in his deposition the tentative nature of these conclusions by testifying that he never considered the investigation closed. (J.A. at A0290, A0295.)

In terms of Plaintiff's conditional cross-petition, the full particulars of the fire do not much matter. The issue Plaintiff argues before the Court is whether the appellate court correctly decided the design defect claim. As Hudson's will show, the appellate court was correct regardless of which version of the accident is ultimately accepted.

B. Discovery And Plaintiff's Flammability Tests

Plaintiff devotes a large portion of her cross-petition to a discussion of her expert's flammability tests. Beyond mere opinion testimony, these tests represent her only proof supporting her allegation that the blouse was defective. Given their obvious importance, it is worthwhile to trace the chronology of the tests' disclosure.

Plaintiff submitted the reports of her expert, David Hall, on September 1, 1997, within the deadline set by the trial court. (J.A. at A0198, A0207.) In those reports, he concluded that the blouse was "highly flammable." (*Id.*) Although he claimed that there were other alternative designs, he did not identify them. Furthermore, he did not identify any flammability tests, the risks associated with any designs or the utility of any alternatives.

His deposition on October 17,1997, was much the same. When asked, he admitted that he had not conducted any flammability tests. (Def.'s Mot. in Limine to Exclude All Pl.'s Evidence Post-Dates Disc. Deadline Oct. 31, 1997 Ex. W at 48, 130.) He simply opined that the blouse was unreasonably dangerous because of characteristics he could "eyeball" in a scanning electron microscope. (J.A. at A0850, A0853.) He offered no opinions about the risks and utility associated with the blouse in question. Likewise, he offered no opinions about the risks and utility associated with any alternative designs. In fact, Plaintiff's counsel stipulated during the deposition that he would not offer opinions on these subjects. (J.A. at A0150.)

After his deposition, after the close of discovery, and just before Hudson's moved for summary judgment, Hall finally conducted his flammability tests. (Def.-Appellee's Final Br. on Appeal at 16 n.20.) Hudson's was not present during the tests and its only knowledge of them comes from an edited videotape. Because of the tardy disclosure of the

test results, Hudson's could not even address them in its original motion in limine to bar Hall from testifying on other grounds. Instead, the late disclosure forced Hudson's to object as part of its reply brief in support of its motion in limine. (Def.'s Br. Reply to Pl.'s Resp. to Hudson's Mot. to Limit Test. of David Hall.) Hudson's also moved to strike the results because they were disclosed after the trial court's deadlines for doing so. (Def.'s Mot. in Limine to Exclude All Pl.'s Evidence Post-Dates Disc. Deadline Oct. 31, 1997.)

At the time Hudson's filed the motion in limine to bar Hall from testifying, it filed numerous other motions including the summary judgment motion that is the subject of the petition and conditional cross-petition before this Court. The district court granted the summary judgment motion before ruling on any of the other motions. Thus, the district court never passed on the legitimacy of Hall's flammability tests in the face of their undeniably late disclosure.

Because they were disclosed so late in the game, Hudson's has never had a chance to question Hall about the tests. Hudsons' has no way of knowing whether any scientific rigor underlies the results. For example, it is impossible to tell whether the tests were conducted under controlled circumstances yielding results that can be replicated. Indeed, Hudson's cannot even tell whether the tests are anything more than a clever parlor trick. Certainly, Hudson's has not had a chance to challenge Hall's results under the principles that this Court outlined in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Perhaps it is for these reasons that Plaintiff relies so heavily on Hall's tests in pressing her case before this Court.

REASONS FOR DENYING THE WRIT

Unlike the Sixth Circuit's abrupt reversal on Plaintiff's failure-to-warn claim, the treatment of her design defect claim has remained consistent throughout this litigation. The reason for this difference lies not in any difference in the

substantive areas of law. Rather, the real reason lies in the trial and appellate courts' approach to the two claims.

When the Sixth Circuit amended its opinion, it did not notify the parties that it was reconsidering the implied warranty, failure-to-warn claim nor did it permit additional briefing or argument. This stands in stark contrast to the treatment of Plaintiff's design defect claim. The trial court alone devoted three separate hearings to that claim and offered the parties a chance for additional briefing—all before ruling on Hudson's motion for summary judgment. Besides this well-developed record, the appellate court, of course, received additional briefing and argument on the design defect claim. At every stage of the proceedings, both parties knew that the design defect claim was under consideration and were given every opportunity to be heard. This strict adherence to the demands of due process explains why the Sixth Circuit's handling of Plaintiff's design defect claim comported with the constitutional requirement of *Erie*, while its handling of her failure-to-warn claim fell woefully short.

I. THE TRIAL AND APPELLATE COURTS CORRECTLY ANALYZED PLAINTIFF'S DESIGN DEFECT CLAIM UNDER MICHIGAN LAW

A. THE TRIAL AND APPELLATE COURTS PROPERLY IDENTIFIED AND APPLIED MICHIGAN'S RISK-UTILITY TEST TO PLAINTIFF'S DESIGN DEFECT CLAIM

Before discussing the risk-utility test as identified and applied by the trial and appellate courts, it may be helpful to trace the test's theoretical underpinnings. In *Prentis v. Yale Manufacturing Co.*, 365 N.W.2d 176, 186 (Mich. 1984), the Michigan Supreme Court adopted "a pure negligence, risk-utility test" for design defect claims against manufacturers

and sellers. Under this test, a plaintiff has the burden of proving that the design choice rendered the product defective. To properly evaluate a design choice, a jury must consider, and a plaintiff must prove, the same factors that a manufacturer must consider in designing the product. See *id.* at 183-184; *Gregory v. Cincinnati, Inc.*, 538 N.W.2d 325, 329-330 (1995).

The goal of Michigan's risk-utility test is to provide the jury with enough evidence so that it can independently weigh the risk against the utility of the challenged design and then compare that to the risk and utility of the plaintiff's proposed alternative. *See Prentis*, 365 N.W.2d at 184. In other words, a plaintiff is to provide the jury with the same kind of evidence that a manufacturer would consider in choosing one design over several alternatives. In light of this evidence, the jury must then decide whether the manufacturer or seller was negligent.

In numerous decisions over the years, Michigan courts have fleshed out what is meant by the words "risk" and "utility." (See cases collected in Def.-Appellee's Final Br. on Appeal at 21-35.) "Risk" means the magnitude of the foreseeable risk and requires proof of the severity of the foreseeable risk and its frequency. "Utility" means more than the most fundamental expression of a product's use. Although an airplane and a car are both modes of transportation, Michigan would not regard one as a comparable alternative to the other. Between genuinely comparable designs, "utility" means a consideration of availability, practicability, and safety.

With this background in mind, the trial and appellate courts separated the risk-utility test into its components and listed them as follows:

> (1) that the severity of the injury was foreseeable by the manufacturer;

> (2) that the likelihood of occurrence of her injury was foreseeable by the manufacturer at the time of distribution of the product;
> (3) that there was a reasonable alternative design available;
> (4) that the available alternative design was practicable;
> (5) that the available and practicable reasonable alternative design would have reduced the foreseeable risk of harm posed by defendant's product; and
> (6) that omission of the available and practicable reasonable alternative design rendered defendant's product not reasonably safe.

(Pet. Cert. App. at 12a.) As can be briefly shown, Michigan case law amply supports the treatment of each component as a separate element of proof.

The first two elements comprise the magnitude of the foreseeable risk portion of the risk-utility test. In *Reeves v. Cincinnati, Inc.*, 439 N.W.2d 326, 329 (Mich. Ct. App. 1989), the court held that proof of the magnitude of the foreseeable risk includes evidence regarding "the likelihood of occurrence of the type of accident" and "the severity of injuries sustainable from such an accident."

The next three elements are part of the utility prong of the risk-utility test. In *Owens v. Allis Chalmers Corp.*, 326 N.W.2d 377, 379 (Mich. 1982), the court held that the required proof includes evidence that a proposed alternative design is "practical." The *Reeves* court required that the proposed alternative design "would have been effective as a reasonable means of minimizing the foreseeable risk of danger." *Reeves*, 439 N.W.2d at 329. Summarizing Michigan law the court in *Gawenda v. Werner Co.*, 932 F. Supp. 183, 187 (E.D. Mich. 1996), decided that a plaintiff must establish that the alternative is "available, reasonably efficient and safe."

The final element represents nothing more than a common-sense limitation on the scrutiny a product will be subjected to. A manufacturer or seller will not be found liable in Michigan because an already safe product can be made incrementally or trivially safer. A manufacturer or seller will only be liable when the challenged design is not reasonably safe compared to the plaintiff's proposed alternative.

Thus, rather than representing a "marked change" from Michigan law, the risk-utility test articulated by the trial and appellate courts is entirely consistent with its theoretical framework. These courts' application of the risk-utility test to Plaintiff's case is also consistent with the large number of Michigan cases confronting similar issues. (See cases collected Def.-Appellee's Final Br. on Appeal at 21-35.) In short, these courts reached precisely the result required under *Erie*, one in complete harmony with Michigan law.

B. The Trial And Appellate Courts' Decisions On Plaintiff's Design Defect Claim Is Consistent With The Decisions In *Phillips* And *Prentis*

Plaintiff claims that the trial and appellate courts' opinions were somehow contrary to the Sixth Circuit's previous decision in *Phillips v. Hardware Wholesalers, Inc.*, 762 F.2d 46 (6th Cir. 1985). The *Phillips* court held that the plaintiff's proof satisfied the utility portion of the risk-utility test, because his expert "testified that the alternatives he proposed were available, reasonably efficient and safe..." *Id.* at 49. These three qualities are essentially the third, fourth, and fifth elements of the test that the trial and appellate courts used here. Thus, it is hard to see how *Phillips* is in any way inconsistent with the *Hollister* courts' opinions.

Plaintiff's real complaint is how these elements were applied to her facts. The appellate court held that her proof failed the risk-utility test because she did not establish that

the alternative fabrics were available at the time of manufacture. (Pet. Cert. App. at 13a-14a.) Plaintiff argues that she has satisfied the risk-utility test because silk and rayon in general were available before the manufacture of the blouse. The short answer is that she has not. As the appellate court noted, although her expert tested various silk and rayon fabrics in 1997, he submitted no evidence that any of the tested fabrics were available at the time of manufacture. This is exactly the proof required under *Phillips* and the risk-utility test. Without this proof, the appellate court reached the only result possible under Michigan law when it affirmed summary judgment.

Plaintiff completely misunderstands the risk-utility test and the importance of demonstrating a truly comparable alternative. Her inability to grasp the notion of comparable products is ultimately the flaw in her entire argument. She erroneously believes that *Prentis* requires that the risk of the challenged design be weighed against its utility. If the risk is high as opposed to the utility, Plaintiff seems to think that the product is therefore defective. *Prentis* actually requires that the risk and utility of the challenged design be compared to the risk and utility of a proposed alternative. Thus, in clothing, where fashion considerations are frequently paramount, Plaintiff also needed to prove that the tested fabrics had the same look and feel as the blouse in question. She never even tried. Her proof failed because she did not establish that the tested fabrics were genuinely comparable.

Although Plaintiff's example of children's pajamas is not particularly helpful because they are a strictly regulated article of clothing, *see* 16 C.F.R. § 1615-16 (2000), a different illustration clarifies *Prentis*. A better example would be to compare the blouse in question with one of wool or leather. Following Plaintiff's logic, a wool or leather blouse satisfies the risk-utility test because both have been around for hundreds of years and neither burns. Like a rayon blouse, either one would have the utility of covering "the upper part of a woman's body." No one would seriously

argue, however, that a wool or leather blouse is genuinely comparable to one of rayon. Neither wool nor leather looks the same, wears the same, feels the same, fits the same or costs the same as rayon. Therefore, neither wool nor leather would pass the risk-utility test because neither is a practical alternative to rayon.

There is nothing in Plaintiff's argument to show that either the trial or appellate court identified the wrong rule of decision. There is nothing in Plaintiff's argument to show that the rule of decision was incorrectly applied. More to the point, there is nothing in Plaintiff's argument that rises to a constitutional level or otherwise has significance for anyone beyond the litigants in this case.

II. PLAINTIFF'S CROSS-PETITION REVEALS HOW THE *HOLLISTER* COURT DEPRIVED HUDSON'S OF PROCEDURAL DUE PROCESS

Throughout her cross-petition, Plaintiff tries to convince this Court that the blouse was defective because of its extreme flammability by emphasizing the importance of Hall's test results. She points to no other evidence to establish the blouse's flammability. Seemingly, her entire case rests on the credibility of Hall's tests. The appellate court agreed as it cited only to the tests as prima facie proof of Plaintiff's failure-to-warn claim.

Despite the Sixth Circuit's heavy reliance on the tests, many questions about their legitimacy remain. Hall conducted his tests well after his disclosures under Fed. R. Civ. P. 26, after he was deposed, and after discovery closed. Plaintiff finally revealed the test results just before Hudson's filed its motion for summary judgment. Hudson's moved to strike the results because of the lateness of the disclosure, but that motion was never decided by the trial court and remains pending today.

Although the district court considered the test results, nothing in the record suggests that the district court deemed

them admissible evidence. The district court simply decided that even if the test results were admissible, they were not enough to defeat Hudson's motion for summary judgment. Nevertheless, the appellate court not only considered the test results, it found them to be "credible evidence" sufficient for Plaintiff's failure-to-warn claim to go to a jury. (Pet. Cert. App. at 19a.) The appellate court reached this finding rather than expressly making the more limited determination that the test results, if otherwise admissible, were enough to defeat Hudson's motion. In doing so, the court may have robbed Hudson's of a chance to be heard on its motion to strike. By characterizing the tests as prima facie proof, the court may also have robbed Hudson's of a chance to challenge the admissibility of the tests under this Court's decision in *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). As discussed in Hudson's petition, the district court was concerned that the broad language of the appellate court's opinion may have precluded it from deciding many of the motions that were still pending at the time of Plaintiff's appeal. (Tr. of May 18, 2000 at 17-19.) At the very least, the Sixth Circuit should have clearly remanded for a further consideration of the tests' admissibility and, if necessary, a reconsideration of Hudson's motion for summary judgment.

As to the single most important piece of Plaintiff's proof, Hudson's has never had an opportunity to challenge its consideration. Depending on how broadly the amended opinion is read, Hudson's may never have that opportunity. That all of this may occur without Hudson's even having the benefit of discovery on the test results only underscores the due process violation. If the essence of due process is fairness, then Hudson's most assuredly has been denied it.

CONCLUSION

For the foregoing reasons the conditional cross-petition for writ of certiorari should be denied.

Respectfully submitted,

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